Clifton, Circuit Judge, concurring:

I agree that the district court's denial of Brown's habeas petition should be reversed and this case remanded for further proceedings. As noted by the majority, decisions rendered by this court after the district court had denied Brown's petition have altered the tolling calculation and may provide a basis for Brown to avoid the limitations bar.

I write separately, however, to express my disagreement with the majority's specific conclusion that "the district court clearly erred in basing its finding [that Brown had access to the AEDPA on September 5, 1996,] on the Curtis declaration" because that "declaration based on guesswork was not sufficiently reliable to support the district court's factual finding." Memorandum at 3-4. The Curtis declaration was admissible and relevant under Fed. R. Evid. 406 as "[e]vidence . . . of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, . . . to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice." Its admission by the district court cannot properly be deemed to be plain error or an abuse of discretion. At the time the district court made its factual finding, the Curtis declaration appears to have been uncontradicted by any evidence in the record.

Furthermore, Curtis clearly set forth the basis for her belief. She noted that, in her experience, the prison library usually received copies of new laws "about two months after they are enacted." AEDPA was enacted April 24, 1996. If it arrived at the library "about two months later," then it would have been there "by August 1996," just as Curtis indicated. Yet the majority, in an oblique twist of logic, draws the opposite conclusion. Because "no one contends that the prison library had copies of AEDPA available for inmate use by [June 1996]," the majority concludes that "Curtis' August date is not based upon habit and routine, but upon guesswork and belief without any factual basis in the record." Memorandum at 4 n.3. I disagree.

It does not follow that, because something would be expected to arrive "about" late June, a statement that it was received "by August" is mere "guesswork." There is simply no inconsistency. Obviously, if AEDPA arrived in June, then it was received "by August." Yet even if Curtis could not be sure that AEDPA arrived in June, her conclusion that it arrived "by August" was still fully consistent with the routine practice she identified of receiving laws "about two months after they are enacted." There should be nothing wrong with a declarant stating a cautious but reasonably based and clearly explained inference, or with a court relying upon it. Evidence like this is presented all the time. Because the

Curtis declaration was admissible, relevant, uncontradicted, and logically consistent, I cannot agree that the district court clearly erred by relying on it.